

Protection of Persons in the Event of Disasters

Statement of the Chairman of the Drafting Committee

26 July 2013

Mr. Chairman,

It is my pleasure, today, to introduce the third report of the Drafting Committee for the sixty-fifth session of the Commission. This report, which deals with the topic “Protection of persons in the event of disasters”, is contained in document A/CN.4/L.815.

The report reproduces the texts and titles of two draft articles, namely draft articles 5 *ter* and 16, provisionally adopted by the Drafting Committee over the course of two meetings, held from 16 to 17 July 2013.

The Drafting Committee had before it the proposal for both draft articles, made by the Special Rapporteur in his sixth report this year, which were referred to the Drafting Committee by the Plenary of the Commission at the 3180th meeting, held on 16 July 2013.

Before turning to this year’s report, allow me to pay tribute to the Special Rapporteur, Mr. Eduardo Valencia-Ospina, whose constructive approach, flexibility and patience once again greatly facilitated the work of the Drafting Committee. I also thank the other members of the Committee for their active participation and significant contributions. Furthermore, I wish to thank the Secretariat for its valuable assistance, in particular Mr Arnold Pronto and Mr Noah Bialostozky. As always, and on behalf of the Drafting Committee, I am pleased to extend my appreciation to the interpreters.

Draft article 5 *ter*

Mr. Chairman,

Draft article 5 *ter* seeks to extend the scope of application *ratione temporis* of draft article 5, on the duty to cooperate, which at present deals with the response phase following the onset of a disaster, so as to also cover cooperation, undertaken during the pre-disaster phase, between States *inter se*, and between States and the United Nations and other competent intergovernmental organizations, the International Federation of Red Cross and Red Crescent Societies and the International Committee of the Red Cross, and including cooperation with relevant non-governmental organizations.

The provision envisages the cooperation being referred to as involving the “taking of measures intended to reduce the risk of disasters”. This phrase is to be understood in the light of both paragraphs of draft article 16. For example, paragraph 2 of that draft article enumerates a series of measures which are generally accepted as being aimed at the reduction of disaster risk. No changes were made to the text of draft article 5 *ter* as had been proposed by the Special Rapporteur.

Permit me to add that the adoption of draft article 5 *ter* was done on the understanding that it was without prejudice to its final location in the draft articles, including the possibility of it being incorporated into a newly revised draft article 5. These are matters that have been left in abeyance for possible adjustment during the finalization of the first reading of the draft articles, at a future session of the Commission.

The title of the draft article is that proposed by the Special Rapporteur, namely “Co-operation for disaster risk reduction”.

Draft article 16

Mr. Chairman,

I turn now to draft article 16, which deals with the duty to reduce the risk of disasters. The draft article is composed of two paragraphs. Paragraph 1 establishes the basic obligation to reduce the risk of disasters by taking certain measures, and paragraph 2 provides a list of such measures. I propose to deal with each paragraph in turn.

Paragraph 1

Most of the Drafting Committee's time was spent on paragraph 1. The Drafting Committee considered paragraph 1 on the basis of a revised proposal by the Special Rapporteur, in which the Special Rapporteur made adjustments to his initial proposal with a view to taking into account the various suggestions made during the plenary debate. While there was agreement on principle, there were differences of view as to where the emphasis was to be placed in the draft article, as well as on the scope of the duty being envisaged. While the Committee initially proceeded on the basis of the Special Rapporteur's revised proposal, several additional drafting suggestions were considered. As I describe each of the facets of the paragraph, I will attempt to summarize the various positions expressed and options raised during the discussion.

The paragraph starts with the words "[e]ach State". The Drafting Committee accepted this formula over "States", which was contained in other proposals and the revised proposal. This was done for the sake of consistency with the draft articles previously adopted, where care had been taken to identify the State or States which bore the legal duty to act. The view of the Drafting Committee was that — different from those draft articles dealing with disaster response where a distinction exists between an affected State or States and other States — in the pre-disaster phase the obligation in question applies to every State. Furthermore, as is evident from paragraph 2, the obligation to reduce risk implies measures primarily taken at the domestic level. Any such measures requiring interaction between States or with other international actors are meant to be covered by article 5 *ter*. In other words, the obligation applies to each State individually. Hence, the Drafting Committee also decided against the word "States" so as to avoid any implication of a collective obligation.

The word "shall" signifies the existence of the international legal obligation to act in the manner described in the paragraph. This is confirmed by the title of the draft article, which refers to the "duty" to reduce the risk of disasters. The obligation is not only one of conduct (to take the

“necessary and appropriate measures”), but also one of result (“to reduce the risk of disasters” by preventing, mitigating and preparing for them). The Drafting Committee also considered alternative formulations, including “shall undertake to”, and “have the duty to”, but settled on “shall” as the most succinct way to convey the sense of legal obligation. While each State bears the same obligation, the question of different levels of capacity among States to implement the obligation is dealt with under the phrase “by taking the necessary and appropriate measures”.

The obligation is to “reduce the risk of disasters”. The debate initially revealed a difference of conception, with some members preferring a formula which re-oriented the obligation into being one to prevent, mitigate and prepare for a disaster. I might mention that this was motivated in part by a linguistic difference involving the United Nations’ official translation, in French, of the concept of “disaster risk reduction”. However, the Drafting Committee eventually adopted the present formula in recognition of the fact that the contemporary view of the international community, as reflected in several major pronouncements, most recently in the Hyogo Declaration issued at the 2005 World Conference on Disaster Reduction, was that the focus should be placed on the reduction of the risk of harm caused by a disaster, as opposed to the prevention of disasters themselves. Accordingly, the emphasis in paragraph 1 is placed on the reduction of the risk of disasters. This is achieved by taking certain measures so as to prevent, mitigate and prepare for such disasters.

As already alluded to, the phrase “by taking the necessary and appropriate measures” indicates the specific conduct being required. In addition to the further specification about legislation and regulations, which I will turn to soon, the “measures” in question are qualified by the words “necessary” and “appropriate”. In his revised proposal, the Special Rapporteur’s had added the reference to necessity, following a suggestion made in plenary, so as to render the phrase as “necessary and appropriate”, which, it was noted, accorded with common practice. Some members in the Drafting Committee preferred only “necessary” while others felt that only

“appropriate” was sufficient. Another suggestion was to refer to “effective” measures, but it was understood that the question of effectiveness of the measures was implied in “necessary and appropriate”. It was also suggested that the phrase be rendered as all “possible” or “available” measures, but that proposal did not attract widespread support. It was agreed to retain both “necessary” and “appropriate” by way of reflecting all the positions expressed in the Committee. What might be “necessary and appropriate” in any particular case is also to be understood in terms of the stated goal of the measures to be taken, namely “to prevent, mitigate, and prepare for disasters” so as to reduce risk. It was further understood that the requirement of due diligence was inherent to the concept of “necessary and appropriate”.

The paragraph then continues and indicates, through the phrase “including through legislation and regulations”, the specific context in which the measures being envisaged are to be taken. The understanding is that the envisaged outcome is a number of concrete measures which are typically taken within the context of a legislative or regulatory framework. Accordingly, for those States which do not already have such framework in place, the general obligation to reduce the risk of disasters would also include an obligation to put such legal framework into place so as to allow for the taking of the “necessary and appropriate” measures. The Drafting Committee considered a proposal to simplify the text by stating “within their national law”. While the idea was similar, since “legislation and regulations” is meant to be understood in broad terms to cover as many manifestations as possible, it was felt that there was some benefit to specifying “legislation and regulations” since, it is generally recognized that this is the most common and effective way for facilitating (hence the word “through”) the taking of disaster risk reduction measures at the domestic level. Another suggestion to state “within its capacity” did not garner support.

The Drafting Committee added the qualifier “including” so as to indicate that while “legislation and regulations” may be the primary methods, there may be other types of rules (including under administrative law) under which such measures could be taken. Indeed, initially there was support in the Drafting Committee for stating “in particular” so as to emphasize the importance of legislation and regulations among the various options. In the end, the Drafting Committee agreed on “including” so as to avoid the interpretation that the adoption and implementation of specific legislation and regulations would always be required. This allows a margin of discretion for each State to decide on the type of legal framework and tools to use to achieve the objectives of the article; it being understood that having in place a legal framework which anticipates the taking of “the necessary and appropriate measures” is a *sine qua non* for disaster risk reduction. I should mention that the use of the definite article “the” before “necessary”, therefore, serves the function of specifying that it is not just any general measures which are being referred to, but rather, specific, and concrete, measures aimed at prevention, mitigation and preparation for disasters.

I wish to also recall that in his initial proposal, made in the sixth report, the Special Rapporteur had referred to measures aimed at ensuring “that responsibilities and accountability mechanisms be defined”. In response to a number of critical comments made in the plenary, the Special Rapporteur revised the phrase so as to read simply “through the adoption of legislation and regulations”. Nonetheless, support was expressed in the Drafting Committee for retaining some reference to implementation and ensuring accountability, within domestic legal systems, for non-performance. However, the Committee decided against doing so in the text, for the reason that such issues were not the only ones which could be the subject of legislation and regulations in the area of disaster risk reduction, and accordingly singling them out could lead to confusion. It was agreed, however, that a reference could be included either in the commentary

or possibly in a definition of “legislation and regulations” to be inserted in a use of terms provision.

As already indicated, that last clause, namely “to prevent, mitigate, and prepare for disasters” serves to describe the purpose of the “necessary and appropriate” measures which States are to take during the pre-disaster phase, with the ultimate goal of reducing their exposure to the risk of disasters. The phrase tracks the now well-accepted formula used in major disaster risk reduction instruments, and the Drafting Committee was cognizant of the fact that adopting a different formulation could result in unintended *a contrario* interpretations as to the kinds of activities being anticipated in the draft article.

Here, I wish to record that there was a view in the Drafting Committee that the concept of “mitigation” applied to both the pre-disaster and disaster phases, and possibly afterwards too. In terms of drafting, it was suggested that reference then could be made to the mitigation of the “effects of the disaster”. This proposal was, in part, motivated by a discrepancy in the concordance between the English and French versions of the official United Nations definition of the concept of “mitigation”. Nonetheless, the Drafting Committee decided against including a reference to “effects”, for fear of introducing further complexity into a draft article dealing with activities to be undertaken during the pre-disaster phase. While it was acknowledged that, conceptually, the three types of measures, if successfully implemented, would serve to limit the exposure to risk and thereby reduce harm experienced during the disaster phase, what was being referred to in draft article 16 was specific measures aimed at mitigating “risk”. This was, of course, without prejudice to the possibility that the question of the mitigation of harm caused by a disaster could be considered later in a separate provision.

Paragraph 2

Mr. Chairman,

Paragraph 2 of draft article 16, lists three categories of disaster risk reduction measures, namely: conducting risk assessments, collecting and disseminating risk and past loss information, and installing and operating early warning systems. It was recalled in the Drafting Committee that other activities had been identified in the Special Rapporteur's report, and during the plenary debate. Nonetheless, the Committee decided to limit the paragraph to the three most prominent types of activities in contemporary disaster risk reduction efforts. I would add that the word "include" serves to indicate that the list is non-exhaustive. In the various versions proposed by the Special Rapporteur, this point had been reinforced by the phrase "but are not limited to". The Drafting Committee, however, deleted the phrase "but are not limited to" since it was implied in the word "include". Accordingly, the listing of the three measures is without prejudice to other activities aimed at the reduction of the risk of disasters which are being undertaken at present, examples of which will be listed in the commentary, or which may be undertaken in the future.

I also recall my explanation of paragraph 1, in which I indicated that paragraph 2 envisages the taking of the listed measures within the State, and that any inter-State components would be covered by the duty to cooperate in article 5, read together with article 5 *ter*.

Finally, I wish to record that the Special Rapporteur's revised proposal had referred to the dissemination of risk and past loss information "for free", by way of reflecting the current trend of emphasizing the importance of public access to such type of information. The Drafting Committee, while recognizing the importance of the principle, felt that it was best dealt with in the commentary – which will indicate that, in principle, access to information should be provided for free – since making it a uniform legal requirement could prove burdensome for States. The extent of any international legal duty to disseminate information for free is accordingly left to the specific agreements each State has entered into.

The title of draft article 16 is “Duty to reduce the risk of disasters” which had been included in the Special Rapporteur’s revised proposal on the basis of a suggestion made during the plenary debate.

Mr. Chairman,

This concludes my introduction of the third report of the Drafting Committee this year. It is my sincere hope that the Plenary will be in a position to adopt the draft articles presented.

Thank you.